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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-709

UNITED STATES OF AMERICA ex rel David P. Weinberger and DAVID P. WEINBERGER, ESQ., individually,

Petitioners,

v.

EQUIFAX, INC. (formerly Retail Credit Company),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent opposes Petitioner's prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 12, 1977.

OPINIONS BELOW

The opinion of the court of appeals is officially reported. *United States ex rel Weinberger* v. *Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977). The order of dismissal of the district court that is the subject of the opinion of the court of appeals is not officially reported. Both the opinion of the court of appeals and the order of dismissal of the district court are reprinted in the appendix of the Petition, beginning at pages 7-A and 1-A, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1977, and that court denied a petition for rehearing on October 4, 1977. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner misstates the questions assertedly presented by the Petition. Correctly stated, they are as follows:

1. Does the Anti-Pinkerton Act, 5 U.S.C. § 3108 (1970), that was first enacted in 1892 and that bars employment by the federal government or the government of the District of Columbia of employees of the Pinkerton Detective Agency or similar organizations, apply to Respondent which is dissimilar in not offering for hire quasi-military armed forces?
2. Does Petitioner have standing to seek a declaratory judgment that would provide that the Anti-Pinkerton Act applies to the employment by the federal government of Respond-

ent's services where none of Respondent's past services is alleged to have been in respect of Petitioner nor to have injured Petitioner in any way?
3. If the Anti-Pinkerton Act applies to Respondent, does Respondent's otherwise proper billing of the federal government for services actually rendered constitute a violation of the False Claims Act, 31 U.S.C. §§ 231-232 (1970), where it is not alleged that the government was misled by Respondent, nor that the government made it clear it would not employ detective agencies generally, and where it would be inappropriate to charge Respondent with notice of its alleged coverage by the Anti-Pinkerton Act?

STATUTES INVOLVED

The Anti-Pinkerton Act, 5 U.S.C. § 3108 (1970), provides in full as follows:

> An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia.

The False Claims Act, 31 U.S.C. §§ 231-232 (1970) is lengthy and is reproduced in full in the appendix A of the Petition, beginning at page 22-A.

STATEMENT OF THE CASE

The basis of federal jurisdiction in the court of first instance, the United States District Court for the Southern District of Florida, was 18 U.S.C. § 1331 and 31 U.S.C. § 232(A).

In the district court, Petitioner, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and § 2202 , sought a declaratory judgment that Respondent is an organization within the scope of the Anti-Pinkerton Act, 5 U.S.C. § 3108 (1970), and, because of this status, that Respondent may no longer furnish information to the United States and that past and present contracts between the United States and its agencies and Respondent are illegal, null and void.

In addition, Petitioner, as an informer under the False Claims Act, 31 U.S.C. §§ 231-232 (1970), sought similar declaratory relief, an accounting of all sums paid by the United States or its agencies to Respondent pursuant to any contract between them, and statutory penalties.

The Petition does not contain a correct statement of the alleged facts material to the questions presented. Those alleged facts are as follows:

Petitioner is a citizen of the United States. Respondent is a corporation in the business of collecting information concerning prospective insurance customers and prospective employees and of reporting that information to the insurance company or employer who engages Respondent for that purpose.

In collecting that information, Respondent uses in some cases investigative techniques similar to those employed by detective agencies.

Respondent has in the past provided and presently does provide information concerning prospective government employees to the United States and its agencies pursuant to contract.

Petitioner at one time applied to the United States Civil Service Commission for employment and, in response to a Civil Service request for permission to conduct a background investigation on Petitioner, Petitioner gave his assent to that background investigation. However, Respondent has not been employed by any agency of the United States to investigate Petitioner nor has Petitioner been injured by any investigation by Respondent for the government.

Respondent does not provide watchmen for plants and buildings and it does not offer for hire a quasi-military armed force.

ARGUMENT

At the threshold, the Petition should be dismissed because it fails to present with accuracy, brevity and clearness that which is essential to a ready and adequate understanding of the points requiring consideration. Supreme Court Rule 23, paragraph 4.

Point I

The Inapplicability of the Anti-Pinkerton Act.

Because of the ambiguity apparent on the face of the Anti-Pinkerton Act with respect to its scope of application, the court of appeals examined the legislative history of the Act and determined that it did not apply to Respondent because Respondent does not offer for hire quasi-military armed forces as did the Pinkerton Detective Agency and similar organizations in 1892. 557 F.2d at 461-63. But the question of the meaning and scope of the Anti-Pinkerton Act is not a question, as Petitioner claims, of such importance that it should be decided by this Court as well.

For Respondent, and organizations similar to it, are already the subject of modern, federal regulation, and there is no reason to look to obscure and obsolete legislation as a further means of regulation. In 1970, Congress enacted the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t, with the avowed purpose of requiring "consumer reporting agencies" (of which Respondent is one) to

> adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information . . . [15 U.S.C. § 1681(b)]

The Federal Trade Commission has promulgated interpretive regulations under the Fair Credit Reporting Act: 16 C.F.R. §§ 1.71-1.73 and 16 C.F.R. § 600 (1977). Thus, there is no reason for this Court to pour new wine into an 85 year old act that the court of appeals below aptly described as "an expression of legislative frustration" at the then seemingly unreachable strike-breaking activities of the Pinkertons. 557 F.2d at 461-63.

The court of appeals attached little importance to decisions of the Comptroller General in making its determination, and Petitioner asks this Court to issue the writ to correct this assertedly erroneous attitude. But the weight to be given Comptroller General decisions in matters of statutory construction does not deserve this Court's attention in this case when the subject matter of the statute is not of great importance. Furthermore, at best the decisions of that officer are inconsistent with one another, although Petitioner denies this and the court of appeals apparently found them consistent when it disposed of the

matter in a footnote. 557 F.2d at 463, fn. 6. The Petition itself refers to an opinion of the Comptroller General's office in the form of a letter to US Senator Lawton Chiles dated January 10, 1975, that expressly states that the Anti-Pinkerton Act does not apply to Respondent, and the Comptroller General reaffirmed this position in a letter to Petitioner on December 12, 1975. (Both of these letters are reproduced in the Appendix to this Brief, beginning at pages 1a and 17a, respectively.) Thus, there is nothing in this case that compels this Court to consider the proper weight to be given to Comptroller General decisions.

Point II

Petitioner's Lack of Standing To Obtain Declaratory Relief.

With respect to standing, Petitioner erroneously states that the court of appeals held that a citizen must show a direct injury to himself in order to pursue a claim under the False Claims Act, 31 U.S.C. §§ 231-232 (1970). To the contrary, the court of appeals held as follows on this point:

> The district court ruled that Weinberger lacked standing to assert his informer's suit, that he had failed to comply with the procedural requirements of the [False Claims] Act, and that he had failed to state a claim under the Act. We hold that Weinberger had standing under the False Claims Act and properly pursued the action, but we agree with the district court that he failed to state a claim under the Act. [557 F.2d at 460]

The court of appeals did hold, however, that apart from the False Claims Act the plaintiff had no standing to challenge under the Anti-Pinkerton Act the alleged purchase of Respondent's services by the government, where Petitioner did not allege that any of

the services were in respect of or adversely affected him. 557 F.2d at 459-60. This holding is completely in line with the cases cited by the court of appeals, i.e., *Warth* v. *Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). There is no reason for this Court to address this issue once again, particularly where the court of appeals ruled that Petitioner had standing under the False Claims Act to bring the merits of his Anti-Pinkerton Act claim before that court for its consideration.

Point III

The Absense of a False Claim.

This case is not appropriate for the court to determine whether the False Claims Act applies to a government contractor who performs services and submits billings without blemish but for the fact the contractor may fit within a category of organizations with which the government is forbidden to do business. It is inappropriate because there is no aliegation that Respondent ever misled the government about who it was; nor is it alleged that the government made it clear that it would not employ detective agencies. It is inappropriate because a fair reading of the Anti-Pinkerton Act puts the onus on the government not to employ rather than upon the contractor not to accept employment. The court of appeals correctly held that in "this case the False Claims Act is not an enforcement device for the Anti-Pinkerton Act." 557 F.2d at 461.

This case is also inappropriate because, if this Court were to rule that Respondent is covered by the

Anti-Pinkerton Act, it would be unfair to hold Respondent on notice of that coverage sufficient to charge it with fraud under the False Claims Act. The 85-year-old Anti-Pinkerton Act is ambiguous on its face. No courts but the two below have ever construed it, and the two below construed it not to cover Respondent. The Comptroller General, whose decisions Petitioner deems so important, decided that the Act did not apply to Respondent the only times it addressed this specific issue. Despite this gross uncertainty and doubt that the Anti-Pinkerton Act applies to Respondent, Petitioner asks this court to charge Respondent with knowing that it is covered by the Act and to penalize Respondent to Petitioner's gain (as well as to the gain of the government that has never objected to Respondent's services) under the False Claims Act. This request should be dismissed.

Petitioner's attack on the composition and alleged bias of the court of appeals' panel in an effort to invoke this Court's power of supervision is an unworthy effort that characterized Petitioner's efforts in both courts below. The court of appeals addressed and rejected such attacks on the district court. 557 F.2d at 463. The attack here is worth mentioning only because it gives further evidence that this is not a petition that deserves this Court's further consideration.

CONCLUSION

For the reasons set forth above, Respondent asks that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-139965 Jan. 10, 1975

The Honorable Lawton Chiles
United States Senate

Dear Senator Chiles:

Your letters of June 7, November 5, and December 19, 1974, forwarded for our comment letters from Mr. David P. Weinberger of West Miami, Florida, questioning the propriety of Federal contracts with certain consumer credit reporting agencies in light of 5 U.S.C. § 3108, the so-called "Anti-Pinkerton Act," which provides that—

> "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the Government of the District of Columbia."

By way of background, our correspondence with Mr. Weinberger in this area dates back to mid-1971. In July 1972, Mr. Weinberger questioned a proposal by the Department of Health, Education, and Welfare (HEW) to utilize Retail Credit Company of Atlanta, Georgia, to "spot welfare cheaters and find deserting fathers." Since the matter appeared to involve the proposed award of a Government contract, we began development of the case in accordance with our bid protest regulations, 4 C.F.R. §§ 20.1 *et seq.* HEW subsequently informed us that it did not intend to be a party to any such contracts, and that discussions had centered around possible arrangements between credit reporting agencies and State or local governments to provide information concerning the income of

welfare recipients. In this context, the matter was outside our bid protest authority and, on August 30, 1972, we so advised Mr. Weinberger.

Mr. Weinberger's subsequent letters to you, to various officials of the General Accounting Office GAO), and to several other Government agencies, have advanced the contention that the Anti-Pinkerton Act prohibits the Federal Government from employing certain credit reporting agencies, most specifically Retail Credit Company. He claims that Retail Credit is in reality a "detective agency" within the meaning of the Act, and details a number of controversies involving the company in recent years (several of which were reported by columnist Jack Anderson in the *Post,* December 8, 1971). He also contends that the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* (FCRA), was not intended to modify the Anti-Pinkerton Act, that 15 U.S.C. § 1681f limits the kinds of information credit reporting agencies may furnish to governmental entities, and that "inventigative consumer reports" as defined in 15 U.S.C. § 1681a(e) violate the Anti-Pinkerton Act.

The original Anti-Pinkerton Act was enacted as part of the Sundry Civil Appropriation Act of August 5, 1892, 27 Stat. 368. It was made permanent the following year by the Act of March 3, 1893, 27 Stat. 591. The legislation resulted from congressional concern over the use of private detectives as armed guards by private industry in the labor disputes of the 1880's and 1890's. It appears that Pinkerton detectives were frequently used as strikebreakers and labor spies, a practice which became an emotionally charged issue and gave rise to acts of violence. The Act was given its present wording by the 1966 recodification of title 5, United States Code, Pub. L. No. 89-554, 80 Stat. 378, 416. Many bills have been introduced over the years to repeal or modify the Act but all have failed of enactment. Examples are: H.R. 11743, 86th Cong.; H.R. 7865, 87th Cong.; S. 1543, 88th Cong.; S. 3224, 89th Cong.; S. 2740,

92d Cong.; H.R. 15091, 92 Cong.; H.R. 1433, 93d Cong. A comprehensive discussion of the origins of the Act is contained in S. Rep. No. 447 (to accompany S. 1543), 88th Cong., 1st Sess. (1963).

To our knowledge, the Anti-Pinkerton Act has never been interpreted or discussed in a reported decision of any court. Over the years, however, we have had frequent occasion to consider the Act in rendering decisions on the propriety of expenditures for Government contracts. In this manner, a small body of law has evolved. Since, in your letter to Mr. Weinberger of June 7, 1974, you expressed the desire to be advised on the applicable law, we are providing the following summary of the principles developed through our decisions.

(1) The Act applies to contracts with "detective agencies" as firms or corporations as well as to contracts with or appointments of individual employees of such agencies. 8 Comp. Gen. 89 (1928).

(2) The Act prohibits the employment of a detective agency or its employees, regardless of the character of the services to be performed; the fact that such services are not to be of a "detective or investigative" nature is immaterial. Thus, detectives or detective agencies may not be employed in any capacity. 26 Comp. Gen. 303 (1946).

(3) The statutory prohibition applies only to direct employment; it does not extend to subcontracts entered into with independent contractors of the United States. 26 Comp. Gen. 303 (1946). It is clear from the legislative history of the original 1892 Act that Congress did not intend to reach subcontracts. S. Rep. No. 447, *supra,* at 3-6.

(4) Although we have never defined "detective agency" for purposes of the Anti-Pinkerton Act, we have drawn a distinction between detective agencies

and protective agencies, and have expressed the view that the Act does not forbid contracts with the latter. 26 Comp. Gen. 303 (1946); 38 Comp. Gen. 881 (1959). Thus, the Government may employ a protective agency, but may not employ a detective agency to do protective work.

(5) In determining whether a given firm is a detective agency, we must consider the nature of the functions it may perform as well as the functions it in fact performs. Two factors are relevant here—the firms' authority under its corporate charter and its powers under licensing arrangements in the states in which it does business. If a firm is chartered as a detective agency and licensed as a detective agency, then the fact that it does not actually engage in detective work will not permit it to escape the statutory prohibition. Since virtually every corporation inserts in its charter an "omnibus" clause ("engage in any lawful act or activity for which corporations may be organized in this state," or similar language), we have held that an omnibus clause alone will not make a company a detective agency. Rather, specific charter authorization is needed. 41 Comp. Gen. 819 (1962); B-146293, July 14, 1961.

(6) The Government may employ a wholly-owned subsidiary of a detective agency if the subsidiary itself was organized primarily or solely to avoid the Anti-Pinkerton Act. As long as there is *prima facie* separation of corporate affairs, we do not believe the Act compels us to "pierce the corporate veil." 41 Comp. Gen. 819 (1962); 44 Comp. Gen. 564 (1965).

Before discussing Retail Credit Company specifically, it is necessary to examine the status of credit reporting agencies generally. FCRA defines "consumer reporting agency" as—

> ". . . any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

15 U.S.C. § 1681a(f). "Person" is defined in 15 U.S.C. § 1681a(b) as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." This is consistent with prior judicial definitions. For example, the Supreme Court of Mississippi, in *Retail Credit Company* v. *Garraway,* 240 Miss. 230, 126 So. 2d 271, 273 (1961), defined "mercantile agency" as follows:

> "Mercantile agencies are establishments which are in the business of collecting information relating to the credit, character, responsibility, general reputation and other matters affecting persons, firms and corporations engaged in business. They furnish this information to subscribers of the agency for a consideration. The purpose is to procure such information concerning the trustworthiness of persons and corporations engaged in business as will enable their subscribers safely and properly to conduct business with strangers or distant customers."

It is true, as Mr. Weinberger has pointed out, that reporting necessarily implies investigation. There can be no question that credit reporting agencies engage in investigative work—this is how they get their information. The FCRA definition cited above recognizes this ("*assembling* . . . information"). In the past, we have used the term "investigative" somewhat synonymously with "detective" for the purpose of distinguishing an investigative agency

from a protective agency. However, we have never maintained that a company which engages in, or is authorized to engage in, *any* investigative work whatsoever becomes by virtue of that fact a detective agency, and we do not believe that our decisions, read in their proper context, stand for this proposition. An adoption agency investigates its applicants yet it is certainly not a detective agency as the term is commonly understood. *Cf.* also *Shpack d/b/a Equity Research Company* v. *Baretti,* 349 N.Y.S. 2d 256 (1973), in which it was held that the business of discovering and recovering assets belonging to individuals which are either unknown to the owner or so old as to indicate that they have been abandoned or forgotten, did not amount to the business of a "private investigator" for purposes of the New York licensing statute.

We see the very enactment of FCRA as an indication of congressional recognition that credit reporting agencies do not fall within the Anti-Pinkerton prohibition—at least insofar as Government agencies are concerned—and in this sense we agree with Mr. Weinberger's assertion that FCRA was not intended to modify the Anti-Pinkerton Act. We must assume Congress was aware of the Act when considering and passing FCRA, yet there is no mention of it in FCRA or its legislative history. There are indications, however, that credit reporting agencies were viewed as something different from detective agencies. In a statement before the Subcommittee on Consumer Affairs, House Committee on Banking and Currency, during hearing on H. R. 16340 (an early House version of the FCRA), 91st Cong., 2d Sess. 184 (1970), Professor Arthur R. Miller, then of the University of Michigan School of Law, said—

> "We know that there is a high level of information exchange between the credit bureaus and *detective agencies*. . . . The data collected by a credit bureau . . . may be made available to governmental agencies, employers, insurance companies, *detective agencies* . . . ." (Emphasis added.)

Similarly, Professor Alan F. Westin, Columbia University Law School, in a statement before the Subcommittee on Financial Institutions, Senate Committee on Banking and Currency, Hearings on S. 823 (the Senate bill which was subsequently incorporated into H.R. 15073 as title VII, which in turn became title VI, Pub. L. No. 91-508, the FCRA), 91st Cong., 1st Sess. 83 (1969), noted that the credit reporting agency—

> ". . . is only one link in a private investigation and intelligence network that has expanded enormously in the United States in the past several decades."

Federal Trade Commission guidelines issued shortly after the enactment of FCRA provide as follows:

> "It should be noted that persons who compile reports on individuals for employment purposes are also covered by the Act. Accordingly, private detectives, detective agencies, and other personnel reporting entities are consumer reporting agencies when they prepare and furnish reports to be used in connection with hiring, promotion, retention (including an employee suspected of dishonesty), or reassignment of an individual." 117 Cong. Rec. 17418 (1971).

We note further that hearings on Commercial Credit Bureaus conducted in 1968 before the Special Subcommittee on Invasion of Privacy, House Committee on Government Operations, 90th Cong., 2d Sess., contain at pages 159 ff. an article on the extent to which Government agencies are authorized by law to make use of mercantile reporting agencies. There is no suggestion that such use is in contravention of law.

In line with the foregoing, it is our opinion that credit reporting agencies should not categorically be deemed detective agencies for purposes of the Anti-Pinkerton Act. Mr. Weinberger apparently concurs in this view, since he stated in a letter to our Deputy General Counsel, dated

February 16, 1974, that "I am not suggesting for a moment that the United States may not do business with legitimate credit reporting firms." He went on, however, to state in the same letter:

> "I am suggesting that despite the unfortunate measure of respectability given to 'investigative consumer reports' by the Fair Credit Reporting Act, these types of information compilations are illegal within the meaning of 5 U.S.C. Sec. 3108, and that all other activity of firms and persons preparing such 'investigative consumer reports' should be proscribed under that Act."

This reveals what appears to be an underlying inconsistency in Mr. Weinberger's position. If investigative reports are illegal under § 3108, and if all credit reporting agencies by hypothesis do some investigative work, then all credit reporting agencies would have to be detective agencies for purposes of § 3108—a result we believe was contemplated neither by the Anti-Pinkerton Act nor by FCRA.

There is now for consideration the question whether Retail Credit Company falls within the scope of the general considerations discussed above. In addressing this question, we specifically refrain from commenting on the various improprieties on the part of Retail Credit cited by Mr. Weinberger since they involve matters beyond our jurisdiction, i.e., matters of State law, criminal law, and matters placed by statute within the responsibility of other agencies. In any event, they are of tangential significance to the question at hand, our concern being with the nature of Retail Credit's work rather than how it is performed.

To determine the nature of the work Retail Credit is authorized to do, we obtained a copy of its corporate charter. The "purpose statement" is set forth below in full:

> "The particular business in which it desires to engage is the making of reports to insurance companies concerning the propriety or advisability of accepting applications for insurance; the making of financial reports on all matters of financial concern to its patrons; the making of investigations for the furnish ng of information in reference to investments and credits and the furnishing of such information; the doing of a general reporting business; the procuring and furnishing of information as to claims presented against or asserted by any person, firm, partnership or corporation; the issuance of such publications as may from time to time be deemed necessary or advisable in the conduct of its business; the lending of money upon such security as its corporate authority may approve; the acquiring by purchase, exchange or otherwise of any real estate or interest therein, and personal property and choses in action, including stocks, bonds, deventures [sic] and/or any other kind of security or securities issued by persons, partnerships or corporations, including securities issued by the Federal, State or Municipal governments, and also including all forms of securities issued by itself; and/or the notes of individuals or partnerships or corporations, secured or unsecured; also the right to lease any real estate or interest therein; to own and hold such properties or interest in properties, and to sell or otherwise dispose of the same; and in general to manage its properties or interest therein. Said corporation shall also have power to act as agent or broker for any person or persons in the transacting of any lawful business."

As noted above, we have never attempted to define "detective agency," nor have we spelled out exactly what a charter must contain in order to make a company a detective agency for purposes of § 3108. It certainly should not require the actual words "detective agency." In the ab-

sence of a suitable definition, some insight may be gained from what the term is understood to mean in contemporary usage. As one indication of this, we examined the listings and advertisements in the 1974 Washington, D.C., "yellow pages" telephone directory under the heading "Detective Agencies." (There is a separate heading for credit reporting agencies.) Functions vary somewhat but may be roughly grouped into two categories, protective services and investigative services. Protective services include such things as general armed guard service, industrial security (plant, store, etc.), and residential security (apartment, hotel, etc.). The following types of service may be called investigative: domestic (divorce, child custody), insurance, criminal, employment, accident, and location of missing persons. In addition, many agencies conduct polygraph examinations. In accordance with our prior decisions, even though protective services appear to be commonly furnished by detective agencies, we would not consider an agency furnishing solely protective services to be a detective agency for purposes of § 3108.

We understand that over 80% of Retail Credit's work is in the area of insurance investigating and reporting. Credit and employment reporting make up the remainder. Hearings on S. 823, *supra,* at 218. Under its "omnibus" clause ("act as agent or broken for any person or persons in the transacting of any lawful business"), Retail Credit could legally engage in all other types of investigative work, but this is not enough to invoke the Anti-Pinkerton prohibition. From the information available to us, Retail Credit's investigative functions are all commercial in nature. There appears to be no specific charter authority covering the other investigative areas commonly associated with private detectives (e.g., domestic, criminal, and accident investigation, and location of missing persons). Thus, to the extent that Retail Credit can be called an investigative agency, it is a specialized rather than a general one.

Our position regarding interpretation of the Anti-Pinkerton Act was set forth in detail in 44 Comp. Gen. 564 (1965.) Although that case involved the relationship of a subsidiary to its parent corporation, we believe the approach reflected therein is pertinent here and hence quote at length from that decision:

> "In the first session of the eighty-eighth Congress, Senator McClellan introduced S. 1543 which proposed to repeal the anti-Pinkerton statute. The outright repeal provision of the bill was later amended to preclude only the employment of detective personnel for the purpose of providing investigative services; and as amended, the bill passed the Senate without much discussion. 109 Cong. Rec. 19743. In the House, the bill was not reported out of committee. The report on the bill from the Senate Committee on Government Operations, S. Rept. No. 447, dated August 20, 1963, is most instructive with respect to the circumstances leading to enactment of the anti-Pinkerton legislation in the first instance and as to the reasons for proposing its repeal. We quote the conclusions drawn by the Committee, appearing at page 7 of the report:
>
> " 'As indicated earlier, S. 1543 would repeal a provision of law which was adopted originally 71 years ago, as a temporary limitation in an appropriation measure, and was made permanent the following year. Its enactment arose out of public and congressional concern resulting from the use by steel and railroad corporations of employees of the Pinkerton and other detective agencies as armed guards, labor spies, and strikebreakers in labor disputes, giving rise to bloodshed, loss of life, and destruction of property.
>
> " 'An examination of the legislative history of the provision reveals that, in its original form, it would have prohibited the Federal Government and the government of the District of Columbia from entering

into any contracts with firms or corporations which employed as armed guards employees of the Pinkerton or similar detective agencies. This provision was felt by the Congress to be too drastic, under the circumstances, since its effect might have been to require the Government to terminate various defense contracts then in effect. Furthermore, it was felt that such action, if appropriate, should be accomplished by positive legislation, following the reports and recommendations of Senate and House committees investigating these activities, rather than by means of a rider to an appropriation act.

"Following numerous Senate-House conferences on the provision in question, the present language was adopted as a compromise, on the last day of the 1st session of the 52d Congress. The same provision was included in an appropriation measure the following year, without any any floor discussion or debate.

" 'Labor-management relations today are fully regulated by Federal and State statutes, and all of the Federal agencies concerned agree that there is no longer any justification for the continuance of this prohibition. Furthermore, it appears that it discriminates against those detective agencies which furnish both investigative and protective services, and is detrimental to the best interests of the Government, since it eliminates from competitive bidding numerous major detective agencies which would otherwise respond to Government invitations to bid on contracts for the furnishing of supplementary guard service. Finally, the committee has in its files, copies of letters from officials of various unions having contracts with the Pinkerton and similar agencies, endorsing the enactment of an identical bill which was pending in the House of Representatives in 1960, as well as information showing that the Pinkerton Detective Agency, as

of 1960, had contracts with unions throughout the country.

" 'It is the view of the committee that the present prohibition serves no useful purpose whatever, is detrimental to the best interests of the Government, and discriminates against a class of detective agencies without any justification. Accordingly, the committee urges enactment of S. 1543.

"These conclusions and the underlying detailed review of the anti-Pinkerton measure history contained in the Committee's report leave no doubt but that whatever may have been the overriding policy considerations leading to enactment of this legislation some 70 years ago, they do not have much, if any, bearing on the current practice of the Government contracting for guard services of the type here involved.

"While we shall of course be required to apply the literal provisions of the anti-Pinkerton statute for so long as it remains in force, we do not consider that it embodies such elements of a policy nature as to require that we pierce the corporate veil in situations comparable to Wackenhut Corporation and its subsidiary Wackenhut Services, Incorporated. Application of the statute is itself somewhat ambiguous in light of the intention of the Congress which enacted it, even when considered in conjunction with the activities of the parent company. To further extend its application to the subsidiary company carries the injunction too far from its originally intended purpose for this Office to conclude that the parent and subsidiary are one and the same. We understand that a number of subsidiaries of detective agencies now hold and have held Government contracts for guard services. Overruling our prior decision would doubtless require protracted considerations of each case to ascertain the exact relationship of each contracting company to its parent

> and the question of whether or not its current contracts should be canceled at the cost of much disruption to the Government's business. We do not believe we would be justified in subjecting the Government to such disruption of its activity on the basis of so equivocal a policy as underlies the 70 year old anti-Pinkerton statute as it relates to the furnishing of guard services to the Government today."

We recognize that the question of Retail Credit's status is a close one. Based, however, on the information available to us, and keeping in mind that the prohibition of § 3108 is expressed in terms of "the Pinkerton Detective Agency, or similar organization," it is our opinion that to call Retail Credit Company a detective agency for purposes of § 3108 would require a degree of interpretation far beyond anything contemplated by the original statute.

Finally, Mr. Weinberger argues that 15 U.S.C. § 1681f limits the types of information credit reporting agencies may furnish to Government agencies. Section 1681f, entitled "Disclosures to governmental agencies," provides:

> "Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency."

Section 1681b, entitled "Permissible purposes of consumer reports," provides:

> "A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> "(1) In response to the order of a court having jurisdiction to issue such an order.

> "(2) In accordance with the written instructions of the consumer to whom it relates.
>
> "(3) To a person which it has reason to believe—
>
> "(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> "(B) intends to use the information for employment purposes; or
>
> "(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
>
> "(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> "(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

"Person" includes governmental agencies or subdivisions for purposes of FCRA. 15 U.S.C. § 1681a(b).

It seems clear to us that § 1681f was not intended to limit disclosures permissible under § 1681b. Rather, § 1681f permits limited disclosure in addition to § 1681b to agencies that presumably would not qualify for full reports under § 1681b. The legislative history of FCRA supports this reading. Thus, the provision that became § 1681f was explained in S. Rep. No. 91-517 (to accompany S. 823), 91st Cong., 1st Sess. 6 (1969), as follows:

> "The disclosure of information to governmental agencies is limited to identifying type information

such as name, address and place of employment *unless the governmental agency* has obtained a court order or *is a bona fide creditor, insurer, employer, or licensor.*" (Emphasis added.)

We hope the foregoing serves the purposes of your request. The enclosures to your letters are returned herewith.

Sincerely yours,

R. F. KELLER
Deputy Comptroller General
of the United States

Enclosures

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-139965 Dec. 12, 1975

David P. Weinberger, Esq.
5920 S.W. 16th Terrace
West Miami, Florida 33155

Dear Mr. Weinberger:

We have received your letters over the past several months concerning the status of Retail Credit Company in light of the so-called "Anti-Pinkerton Act," 5 U.S.C. § 3108, which prohibits employment by the Federal Government of any "individual employed by the Pinkerton Detective Agency, or similar organization," and the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.* We provided partial replies on August 1 and October 14, 1975, B-139965. The purpose of this letter is to complete that response.

On July 1, 1975, you requested copies of all unpublished decisions on the "meaning and application" of the Anti-Pinkerton Act. We are enclosing those decisions herewith, which are listed in Attachment 1. To provide as complete a package as possible, please note that we are sending (a) published decisions (some of which you may already have), (b) unpublished decisions (except those already sent to you on October 14), and (c) decisions of the Comptroller of the Treasury, covering the period prior to 1921. We regret that some of the earlier decisions are barely legible, but we are sending the best quality that we were able to reproduce. Other decisions you may see cited in some of the enclosed decisions merely cite the Act without discussion or application. In our October 14 letter, we explained why only a small portion of our decisions can be published. As indicated in previous correspondence, we are sending the same material to Paul M. Stokes of Smathers & Thompson, counsel for Retail Credit Company.

In your May 15 letter, you contend that our Federal claims collection regulations, specifically 4 C.F.R. §§ 104.2 and 105.3(b) are outdated in light of FCRA. Section 104.2 lists "credit agency skip locate reports" as a permissible means of assistance in locating missing debtors. Section 105.3(b) provides that credit data accompanying claims referred to the General Accounting Office or to the Department of Justice may take the form of a "commercial credit report." If a "skip locate report" is an "investigative consumer report" as defined in 15 U.S.C. § 1681a(e), its use must be disclosed to the consumer under 15 U.S.C. § 1681d. Literal compliance with section 1681d in the case of a missing debtor is, of course, impossible. If the skip locate report is merely a "consumer report" as defined in 15 U.S.C. § 1681a(d), its use must, as you point out, be in compliance with sections 1681b and 1681e. In any event, a Government agency may obtain the identifying information specified in section 1681f.

It has been clearly established in the courts that FCRA applies only to reports used in connection with personal as opposed to business or commercial transactions. *Wrigley* v. *Dun & Bradstreet, Inc.*, 375 F. Supp. 969 (N.D. Ga. 1974), *Sizemore* v. *Bambi Leasing Corp.*, 360 F. Supp. 252 (N.D. Ga. 1973); *Fernandez* v. *Retail Credit Co.*, 349 F. Supp. 652 (E.D. La. 1972). Our Federal claims collection regulations do not distinguish between personal and commercial claims. Thus, to the extent commercial claims are involved, the strictures of FCRA are not applicable. Also, it is our understanding that a "skip locate report" may be either a "consumer report" or an "investigative consumer report," depending upon how the information is gathered.

The Federal claims collection regulations are required to be issued jointly by the Attorney General and the Comptroller General. Hence, we cannot unilaterally make any changes. However, we are considering the points you raise and, if we conclude that a change is necessary or desirable, we will consult with the Attorney General to develop suitable language.

Your remaining letters deal with the status of Retail Credit Company, which you contend should be held a "detective agency" for purposes of the Anti-Pinkerton Act. In our previous consideration of this issue, we reviewed the history of the Act and its interpretation over several decades by our Office. We concluded that (1) credit reporting agencies should not categorically be deemed detective agencies for purposes of the Anti-Pinkerton prohibition, and (2) Retail Credit Company, although it certainly performs some investigative services, is not, in our opinion, a detective agency within the scope of that prohibition. We have reviewed the various materials you submitted with your letters and note especially that you have appealed the dismissal of your action against Retail Credit Company. While it has long been the policy of this Office to refrain from considering or commenting on matters which are currently in litigation, our review occurred before we were aware of your appeal. In any event, while we still believe that the question is a close one, we fail to find sufficient basis to alter our previous conclusion. This is not intended in any way as an endorsement of Retail Credit Company or of any of the methods it might employ.

We recognize and appreciate the sincerity of your contentions. Nevertheless, the matter has been fully reviewed in the past and we must now consider it closed.

Sincerely yours,

Comptroller General
of the United States

Enclosures (28)

cc: The Honorable Lawton Chiles
United States Senate

Paul M. Stokes, Esq.
Smathers & Thompson
Alfred I duPont Building
Miami, Florida 33131

ATTACHMENT

A. *Published decisions*

3 Comp. Gen. 681 (1924)

8 Comp. Gen. 89 (1928)

26 Comp. Gen. 303 (1946)

38 Comp. Gen. 881 (1959)

41 Comp. Gen. 829 (1962)

44 Comp. Gen. 564 (1965)

51 Comp. Gen. 494 (1972)

B. *Unpublished decisions* (NOTE: Decisions marked with an asterisk (*) were sent on October 14, 1975, and are not included herewith.)

AD-6772, June 6, 1922

*A-12194, February 23, 1926

A-18856, July 1, 1927

A-32584, August 19, 1930

A-92580, March 4, 1938

*B-32894, March 29, 1943

B-40145, February 19, 1944

B-65315, May 9, 1947

B-140066, November 19, 1959

B-146293, July 14, 1961

*B-156424, July 22, 1965

B-157050, August 9, 1965

B-157147, December 22, 1965

B-1605538/B160540, March 24, 1967

B. Unpublished decisions, cont'd.

B-160538, November 15, 1967

B-161770, November 21, 1967

*B-167723, September 12, 1969

B-139965, July 10, 1970

B-172587, June 21, 1971

*B-177137, February 12, 1973

B-176307(1), March 21, 1973

B-181684, March 17, 1975

C. Decisions of the Comptroller of the Treasury (prior to the creation of the General Accounting Office by the Budget and Accounting Act of 1921)

71 MS Comp. Dec. 488, October 31, 1914

80 MS Comp. Dec. 657, February 13, 1917

89 MS Comp. Dec. 1094, May 19, 1919

90 MS Comp. Dec. 1625, September 25, 1919